Supreme Court, U.S.
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No. 02-1468

In The

Supreme Court of the United States

ROBERTO GONZALEZ and GLORIA HOLLAND,

Petitioners,

v.

NICHOLAS KOKOT and DEVERICK DIXON,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

ANTHONY DEBONIS, JR.
Counsel of Record
SMITH & DEBONIS, LLC
9696 Gordon Drive
Highland, IN 46322
Phone: (219) 922-1000
Fax: (219) 922-1600

Counsel for Respondent Deverick Dixon

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

STATEMENT OF THE PARTIES PURSUANT TO RULE 29.6

The Petitioners are Roberto Gonzalez and Gloria Holland. The Respondents are Nicholas Kokot and Deverick Dixon, now known as Yanci Mumba. There are no corporate parties.

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STATEMENT OF THE CASE

I. Procedural History of the Case

Petitioners Roberto Gonzalez and Gloria Holland (plaintiffs below, hereinafter "Petitioners") were arrested and charged with disorderly conduct and with forcibly resisting, obstructing or interfering with a law enforcement officer. Respondents Nicholas Kokot and Deverick Dixon (defendants below) were the arresting police officers of the City of East Chicago, Indiana. The Petitioners filed tort claim notices required under Indiana law (Indiana Code § 34-13-3-8) with the City alleging false arrest, excessive force under state law and for violation of their civil rights under the Fourth Amendment through 42 U.S.C. § 1983. After discussing the criminal case and after consulting with the Petitioners' counsel and the Respondents, the prosecutor dismissed the claims against the Petitioners with the understanding that the Petitioners would not pursue charges against the Respondent officers.

A year later, the Petitioners filed suit against the Respondents in the United States District Court under 42 U.S.C. § 1983 for alleged violations of the Petitioners' civil rights. Respondent Dixon moved for summary judgment in which Respondent Kokot was granted leave to join. Respondents' summary judgment motion examined the factors enumerated by the Supreme Court in *Town of Newton v. Rumery*, 480 U.S. 368, 107 S.Ct. 1187, 94 L.Ed.2d 405 (1987), and argued that the releases were enforceable because they were (1) voluntary and (2) did not adversely effect the relevant public interests. Petitioner responded, claiming: (1) that the Court should use a clear and convincing evidence standard when deciding whether the release agreement was enforceable; (2) that

the Court should not look beyond the four corners of the release agreement to the underlying facts surrounding the reason for the release agreement; (3) that the release agreement was given without consideration; and (4) that the agreement violated public policy.

The District Court, per Judge Allen Sharp, granted summary judgment in favor of the Respondents. On April 15, 2002, Petitioners filed their appeal in the United States Court of Appeals for the Seventh Circuit. Briefs were filed on both sides, and the case was argued before the Court of Appeals on September 20, 2002. On December 27, 2002, the Court of Appeals for the Seventh Circuit affirmed the District Court's grant of summary judgment in favor of the Respondents. The Petitioners filed their Petition for Writ of Certiorari on March 27, 2003. The Petition states two reasons for granting the Writ: (1) conflict among the circuits as to the means for determining when release-dismissal agreements for civil rights claims are void as against public policy; and (2) conflict among the circuits as to the acceptable burden of proof needed to establish the enforceability of release-dismissal agreements of civil rights claims.

II. Factual History of the Case

On August 10, 1999, officers Deverick Dixon and Nicholas Kokot were dispatched to an address on Drummond Avenue in the City of East Chicago, Indiana. The Respondent police officers arrived and began to take wood that was in the street in front of the home out of the street and placed it in the grassy parkway between the sidewalk and the curb. Although there is conflict as to exactly what happened next, Petitioner Gonzalez opened the door of the

home and protested to the officers. Things apparently got out of hand and Gonzalez ended up under arrest for disorderly conduct and resisting law enforcement. His companion, Gloria Holland, was also arrested for resisting law enforcement. Gonzalez and Holland allege that they were arrested without probable cause and that excessive force was used to effect the arrest in violation of rights guaranteed to the Petitioners under the Fourth and Fourteenth Amendments to the United States Constitution.

In answering the Complaint, Respondent Dixon admitted that he moved certain wood and concrete forms from the street in front of or near said address, but denied all of the allegations of the Complaint concerning excessive force, arrest without probable cause, and constitutional violations. However, Dixon pleaded an affirmative defense in the form of two written releases of liability signed by Petitioners Gonzalez and Holland, respectively, which were attached to Dixon's Answer as Exhibits A and B. Dixon alleged that the releases bar the imposition of any liability against him under the Petitioners' Complaint.

Gonzalez was arrested for disorderly conduct pursuant to I.C. § 35-45-1-3(2) and resisting law enforcement forcibly under I.C. § 35-44-3-3(1). The charges were brought in East Chicago City Court. Jeffery Schlesinger, an attorney with offices in Crown Point, Indiana, represented Gonzalez and Holland in the criminal proceedings in East Chicago. Although filed in City Court, the charges arose under state law, and Gerald P. Kray, a Deputy Prosecuting Attorney for Lake County, Indiana, was assigned the prosecution of Gonzalez and Holland.

Schlesinger, after commencing his representation, investigated the matter and took depositions of the Respondent police officers together with the training officer of the East Chicago Police Department. He also interviewed at least two other officers, and he served a Request for Production of Documents upon the Prosecutor. Schlesinger also served a Notice of Tort Claim against the City of East Chicago pursuant to I.C. § 34-13-3-8 *et seq*. on or about February 28, 2000, alleging that Respondents Dixon and Kokot, without probable cause, arrested both Gonzalez and Holland and used excessive force in doing so, violating their constitutional rights. The Tort Claim Notice was served upon the Law Department of the City of East Chicago. This was the only communication which Schlesinger had on behalf of his client with the City concerning claims.

Kray, who had been Deputy Prosecutor assigned to the East Chicago City Court since April of 1990, was told by Schlesinger that Petitioners were about to serve a tort claim notice early in the prosecution. It was Kray's practice to notify the Law Department of the City of East Chicago whenever he learned that a claim against the City would be filed. He did this by calling Roy Dominguez, Corporation Counsel of the City of East Chicago. Kray recalled discussing nothing with Dominguez other than putting him on notice that a claim was going to be filed by Schlesinger. Kray testified that Dominguez requested nothing of him in connection with the criminal cases from the City of East Chicago. According to Kray, it was Schlesinger who offered releases of liability signed by his client if Kray would go along with a plea agreement involving either conditional discharge or a deferral of plea leading to an outright dismissal.

Kray did not demand releases as a term of the plea bargain, nor was it his practice to suggest releases in this situation. However, he made it his policy to obtain the consent of the arresting police officers to plea agreements reached in cases involving their arrests. In this case, Kray testified that officers Kokot and Dixon wanted the releases because of the pending tort claim, and that they probably would not have approved of any plea agreement without releases.

Schlesinger, on the other hand, testified that Kray indicated to him that it was the City of East Chicago that was requiring releases and that the releases were prepared by the City Law Department and forwarded directly to Schlesinger. Schlesinger did not think Kray discussed the releases at all with Dominguez. After Schlesinger initiated discussion on a plea agreement, he told Kray that Gonzalez was a police officer in Chicago, Illinois who was already having problems with Chicago Police Internal Affairs and that he wanted to develop a plea agreement that would result in an outright dismissal of the case. Schlesinger stated that Gonzalez could not afford to have a pending criminal case against him, even if a plea of guilty could be avoided. While Schlesinger contended that Kray told him that the City was requiring releases of liability in order to obtain the dismissals, Schlesinger testified that he did not believe that Kray told him that execution of the releases was a condition to obtaining the plea agreement. However, Schlesinger also testified that when he received the release forms from the City Law Department, it was with the understanding that execution of the releases was required in order for the state to approve the plea bargain. Kray testified that officers Dixon and Kokot were willing to consent to dismissal of the criminal charges against

Gonzalez and Holland provided that they were given releases of liability to protect them against the Petitioners' Tort Claims. As Kray explained it, he was not going to dismiss the case without the release of the police officers: " . . . if we were going to do this for him and basically save his career, well, then he wasn't going to go after the East Chicago officers. Moreover, that was the thought process of this whole agreement quite honestly."

The releases, once received by Schlesinger from the City Law Department, were presented to his clients. The clients executed them and Schlesinger delivered the executed releases to Kray in court on the day of disposition. Kray then mailed the completed releases back to Dominguez.

REASONS FOR DENYING THE WRIT OF CERTIORARI

I. The Supreme Court Has Already Determined the Means Used to Determine the Validity of a Release-Dismissal Agreement.

Petitioners first argue that the this Court should grant a Writ of Certiorari because the two-pronged test developed by the Third Circuit is in conflict with the test used by the Seventh Circuit in affirming the judgment of the District Court.

However, in *Town of Newton v. Rumery*, 480 U.S. 368, 107 S.Ct. 1187, 94 L.Ed.2d 405 (1987) this Court already addressed the issue of the means used to determine whether a release of civil rights claims are valid when given in exchange for the dismissal of criminal charges. While this Court has noted "that some release-dismissal

agreements may not be the product of an informed and voluntary decision" (*Rumery*, 480 U.S. at 393), the Court also refused to hold that such agreements were *per se* invalid as against public policy. *Rumery*, 480 U.S. at 393. Instead, the Court elected to employ, as noted by Justice O'Connor, a case-by-case approach, which appropriately balances the important interests at stake. *Rumery*, 480 U.S. at 399 (J. O'Connor concurring).

In *Rumery*, the majority noted that many times "a Respondent's choice to enter into a release-dismissal agreement will reflect a highly rational judgment that the certain benefits of escaping the criminal prosecution exceed the speculative benefits of prevailing in a civil action." *Rumery*, 480 U.S. at 394. In examining the release-dismissal agreement in *Rumery*, the Court examined the entirety of the facts and circumstances surrounding the case to determine the validity of the release-dismissal agreement. The majority in *Rumery* specifically noted that the Petitioner was a sophisticated businessman, was not in jail at the time the release was obtained, and was represented by an experienced criminal attorney, who drafted the agreement. *Rumery*, 480 U.S. at 394. In concluding that the release-dismissal agreement in *Rumery* was valid, the Court stated that the agreement was voluntary, that there was no evidence of prosecutorial misconduct, and that enforcement of the agreement would not adversely affect relevant public interests.

Petitioners have characterized the Seventh Circuit test as one which, in part, looks to see whether there was enough evidence to send the criminal case to trial. The Petitioners further argue that the release of the excessive force claim "is entirely inapplicable" because excessive

force is not related to whether the criminal charges were colorable or triable.

Petitioners have painted a fuzzy picture of the Seventh Circuit's decision in this case. The Seventh Circuit looked at three (3) aspects of the release-dismissal agreement to find that the agreement was valid and affirm the District Court's ruling. First, the Seventh Circuit examined the voluntariness of the Petitioners' acceptance of the agreement. *Gonzalez v. Kokot*, 314 F.3d 311, 318-319 (7th Cir.2002). In reaching its conclusion that the release-dismissal agreement was signed voluntarily by the Petitioners, the Court of Appeals noted that: (1) Gonzalez, a Chicago police officer, had an understanding of the criminal justice process; (2) both Petitioners were represented by counsel; (3) the Petitioners' counsel actively bargained for the release-dismissal agreement with the prosecutor; (4) counsel was present when the release-dismissal agreement was signed; and (5) the release-dismissal agreement was signed after considerable time had elapsed, giving both the Petitioners and their counsel in the criminal proceeding enough time to weigh the consequences of their decision. *Gonzalez*, 314 F.3d at 319.

Next, the Seventh Circuit focused on the question of whether the prosecutor had a legitimate reason to agree to the release-dismissal agreement. *Gonzalez*, 314 F.3d at 319-320. Here, the Seventh Circuit focused on the arguments raised by the Petitioners that the minor charges brought against them were "wholly unjustified." *Gonzalez*, 314 F.3d at 319. However, the Court of Appeals, after examining the facts surrounding the arrest, noted that the minor charges brought against the Petitioners were "supported by enough evidence to send the criminal case to the trier of fact." *Gonzalez*, 314 F.3d at 319-320. As such,

the charges against the Petitioners, "were certainly not 'unfounded criminal charges used as bargaining chips to cover up police misconduct.'" *Gonzalez*, 314 F.3d at 320; citing *Burke v. Johnson*, 167 F.3d 276, 286 (6th Cir.1999). Having concluded that the charges were supported by evidence, the Seventh Circuit also addressed whether the prosecutor conformed with his duties when securing the release-dismissal agreement. *Gonzalez*, 314 F.3d at 320. The Seventh Circuit, after extensively quoting the plurality opinion and Justice O'Connor's concurring opinion in *Rumery*, determined, "Avoiding a potentially costly and lengthy trial over relatively minor matters, with a settlement that was acceptable to both sides, was certainly a legitimate goal related to Kray's duties as a prosecutor." *Gonzalez*, 314 F.3d at 320.

Finally, the Court of Appeals addressed the issue of whether the release-dismissal agreement violated public policy. *Gonzalez*, 314 F.3d at 320-321. The Court concluded it did not. *Gonzalez*, 314 F.3d at 321. In examining this issue, the Seventh Circuit inquired whether the release-dismissal agreement raised "the potential of harm to the public's interest in the proper and uniform enforcement of criminal laws and in seeking episodes of police misconduct adequately addressed." *Gonzalez*, 314 F.3d at 321. The Court found no evidence that either of these two important public policies was violated, and noted that the Petitioners did "received something of value in exchange for the dismissal of their § 1983 claims: the dismissal of the criminal charges against them and the avoidance of the time and expense of a criminal trial." *Gonzalez*, 314 F.3d at 320-321.

The Seventh Circuit found that the release-dismissal agreement in this case was "entered into voluntarily,

without evidence of prosecutorial overreaching" and was "fully consistent with considerations of public policy." *Gonzalez*, 314 F.3d at 321. This is a conclusion similar to the conclusion reached by the majority of this Court in *Rumery*, 480 U.S. at 398.

In summation, a Writ of Certiorari should not be granted as to Petitioner's First Ground because this Court has already effectively stated the means for determining the validity of a release dismissal agreement in *Rumery*, and the Seventh Circuit used the proper analysis in affirming the District Court's decision.

II. Changing the burden of proof from the preponderance of the evidence standard to the clear and convincing evidence standard will not change the outcome in this case.

The Petitioners also argue that this Court should grant a Writ of Certiorari because the Federal Courts of Appeals are divided over the issue of the burden of proof necessary to determine the validity of a release-dismissal agreement. The Third Circuit has determined that the validity of an oral release-dismissal agreement should be determined by a clear and convincing evidence standard. *Livingstone v. North Belle Vernon Borough*, 91 F.3d 515, 534-535 (3rd Cir.1996). However, the Sixth and Seventh Circuits have determined that the validity of release-dismissal agreements should be determined by the preponderance of the evidence standard. *Gonzalez*, 314 F.3d at 319; *Burke v. Johnson*, 167 F.3d 276, 286 (6th Cir.1999).

In *Livingstone*, however, the release-dismissal agreement was an oral agreement, while in this case the agreement was written. The sort of problems inherent in

establishing a valid oral agreement are not present when the agreement is in writing. As such, there is no clear division among the Courts of Appeals as to the burden of proof necessary to prove that a written release-dismissal agreement is valid and enforceable.

Even if *Livingstone* were applicable to written release-dismissal agreements, the application of the clear and convincing evidence standard would not change the outcome of this case.

The District Court granted summary judgment in favor of the Respondents noting, "This Court has no doubt whatsoever that these Petitioners executed these releases freely and voluntarily and with the advice of counsel, and that these releases are valid and enforceable." Order of the District Court dated December 19, 2001. In affirming the District Court's order, the Court of Appeals stated, "The releases signed in this case were part of a contractually valid release-dismissal agreement, fully consistent with considerations of public policy." *Gonzalez*, 314 F.3d at 321.

The Petitioners are not seeking to overcome any of the factual determinations made by the District Court or the Court of Appeals. Instead, the Petitioners pray that by changing the evidentiary standard used by the Court of Appeals from a "preponderance of the evidence" standard to a "clear and convincing" evidence standard, the outcome of the summary judgment ruling will, somehow, be different.

This Court has stated, "[I]n ruling on a motion for summary judgment, the judge must view the evidence

presented through the prism of the substantive evidentiary burden." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 254, 1016 S.Ct. 2505, 91 L.Ed.2d 202 (1986).[1] At the summary judgment stage of the proceedings, the District Court is not to weigh the evidence to find the truth of the matter, but determine whether there is a genuine issue for trial. There is no issue for trial unless there is sufficient evidence from which a jury could find in favor of the nonmoving party. *Anderson*, 477 U.S. at 249.

On a motion for summary judgment in the usual civil case, the District Court Judge must ask whether the evidence unmistakably favors one side or the other, but whether a fair-minded jury could return a verdict for the plaintiff on the evidence presented. *Anderson*, 477 U.S. at 252. In these cases, the District Judge's inquiry then must be "whether reasonable jurors could find by a preponderance of the evidence that the plaintiff is entitled to a verdict." *Anderson*, 477 U.S. at 252. Even if the Petitioners were correct, the District Court's inquiry then would become whether reasonable jurors could find by clear and convincing evidence that the plaintiff is entitled to a verdict.

"'The burden of showing something by a preponderance of the evidence . . . simply requires the trier of fact to believe that the existence of a fact is more probable than its nonexistence before [he] may find in favor of the party who has the burden to persuade the [judge] of the fact's existence.'" *Metropolitan Stevedore Co. v. Rambo*,

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[1] Justice Brennan, now-Chief Justice Rehnquist, and Chief Justice Burger dissented from this holding.

521 U.S. 121, n. 9, 117 S.Ct. 1953, 138 L.Ed.2d 327 (1997); quoting *Concrete Pipe & Products of Cal., Inc. v. Construction Laborers Pension Trust for Southern Cal.*, 508 U.S. 602, 622, 124 L.Ed.2d 539, 113 S.Ct. 2264 (1993). The preponderance standard goes to how convincing the evidence in favor of a fact must be in comparison with the evidence against it. *Rambo*, 521 U.S. 121, n. 9. This burden allows the parties to bear the risk of error fairly equally. *Rambo*, 521 U.S. 121, n. 9.

On the other hand, clear and convincing evidence has been described as evidence which creates a belief in the trier of fact that a fact or an element of a claim is highly probable or creates a firm belief or conviction that the allegation in question is true. 29 *Am.Jur.*2d Evidence § 157. During the summary judgment stage of a proceeding, this Court has characterized clear and convincing evidence to mean, "convincing clarity." *Anderson*, 477 U.S. at 254.

In this case, the facts that that could be presented to the jury remain unchanged. In the negotiation and execution of the release-dismissal agreement, counsel represented both Petitioners. Petitioner Gonzalez was an officer with the Chicago Police Department who "undoubtedly had an understanding of the criminal justice process." *Gonzalez*, 314 F.3d at 319. Counsel for both Petitioners actively bargained for the dismissal of the charges. The negotiations process between Petitioners' Counsel and the Prosecutor took place over a "significant period of time." *Gonzalez*, 314 F.3d at 319. Petitioners had their attorney present when they actually signed the releases. Further, "the benefits of the release-dismissal agreement to Gonzalez especially are obvious: he avoided potential problems

with his job as a Chicago Police Officer." *Gonzalez*, 314 F.3d at 319.

These facts not only meet the preponderance standard, but also show with convincing clarity that Petitioners signed the release dismissal agreement voluntarily. Not only is it highly probable that the releases are valid and enforceable, there can be "no doubt whatsoever that these plaintiffs executed these releases freely and voluntarily and with the advice of counsel." Order of the District Court dated December 19, 2001, p. 3.

Although a higher standard of proof may produce different results in some trials, in many cases it will not. *Anderson*, U.S. at 254; noting the opinion in *U.S. v. Taylor*, 464 F.3d 240, 243 (2nd Cir. 1972). In regard to this case, changing the standard of proof from preponderance to clear and convincing evidence will not change the outcome.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

ANTHONY DEBONIS, JR.
Counsel of Record
SMITH & DEBONIS, LLC
9696 Gordon Drive
Highland, IN 46322
Phone: (219) 922-1000
Fax: (219) 922-1600